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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1552

BANKERS MORTGAGE COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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COMES NOW petitioner, Bankers Mortgage Company (herein referred to as "Taxpayer"), and prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on February 20, 1970.

OPINIONS BELOW

The opinions of the District Court for the Southern District of Texas, Houston Division (R. 48, 63), are not reported. The opinion of the Court of Appeals for the Fifth Circuit (R. 138) has not yet been reported, and a copy thereof is appended to this petition at 1a.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on February 20, 1970 (R. 139), and a copy thereof is appended to this petition at 13a. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

QUESTIONS PRESENTED

1. Whether the application of collateral estoppel to defeat Taxpayer's claim for a refund based on a deduction for interest paid for the year 1962 is in conflict with this Court's opinion in the case of *Commissioner* v. *Sunnen,* 333 US 591 (1948).

2. Whether Int. Rev. Code of 1954, § 163(a) and Treas. Reg. § 1.163-1(b), permit an interest deduction by Taxpayer for its claim for the year 1962.

3. Whether Taxpayer has stated an independent cause of action pursuant to Fed. R. Civ. P. 60(b) for its claim for the year 1937, and whether relief should be granted.

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

1. Fed. R. Civ. P. 60(b):

RELIEF FROM JUDGMENT OR ORDER

• • • •

(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence

which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

2. Int. Rev. Code of 1954, § 163(a)

INTEREST

(a) GENERAL RULE. — There shall be allowed as a deduction all interest paid or accrued within the taxable year on indebtedness.

* * * *

3. Treas. Reg. § 1.163-1(b)

Interest deduction in general.

• • • •

(b) Interest paid by the taxpayer on a mortgage upon real estate of which he is the legal or equitable owner, even though the taxpayer is not directly liable upon the bond or note secured by such mortgage, may be deducted as interest on his indebtedness.

• • • •

STATEMENT

1. The 1937 Transaction Between Taxpayer and Humble Oil & Refining Company (herein called "Humble")

In 1937 Taxpayer owed aproximately $3,000,000.00 to the Reconstruction Finance Corporation bearing interest at 4% per annum. It was necessary for Taxpayer to raise a large amount of cash to liquidate the outstanding loan (R. 78, 80). Among Taxpayer's properties was a ⅞rds mineral interest in a 299.5 acre tract in the Sugarland Oil Field in Fort Bend County, Texas. The tract was subject to an oil and gas lease from Taxpayer to Humble, and Humble also was the lessee of surrounding tracts from their respective owners.

On June 9, 1937, Taxpayer executed two notes payable to Humble, one for $100,000.00 (Taxpayer's Exhibit 1-A, R. 10), and a second for $200,000.00 (Taxpayer's Exhibit 1-B, R. 11), both at 4% interest per year and due on or before June 9, 1967. Interest on the first note was payable monthly and interest on the second note payable in a lump sum at maturity. To secure the two notes, Taxpayer executed a standard Texas form of deed of trust or mortgage on its interest in the 299.5 acre tract (Taxpayer's Exhibit 1-C, R. 12).

In addition, Taxpayer and Humble entered into a contract which further defined the relationship between them

(Taxpayer's Exhibit 1-D, R. 22). Under its provisions, the royalties which would otherwise be paid by Humble to Taxpayer on such tract (stated as 1/180th of all oil and gas produced in the pooled unit known as the Sugarland Oil Field) were instead retained by Humble and used to liquidate the amounts due on the notes, except that the interest on the $200,000.00 note was not due until maturity and had to be paid in cash and not out of production. Under the contract, when the royalties had fully paid the accrued interest on Note No. 1, and the principal of both notes, Humble was given an option to purchase Taxpayer's mineral interest at or within 20 days by releasing Taxpayer from its obligation to pay interest on Note No. 2, except that Taxpayer would retain a .0014 royalty interest in the oil and gas and a 5/9¢ per long ton royalty on sulphur produced by Humble in the Sugarland Oil Field. Taxpayer could convey its entire interest at any time and thus cancel the indebtedness. If production from the Sugarland field ceased and Humble abandoned the property, or if Humble failed to exercise its option to purchase, Taxpayer could cancel the indebtedness by conveying the property to Humble retaining the interest described above. Upon final payment of all principal and interest, the lien would be released.

It was and remains Taxpayer's policy not to sell mineral interests, based upon its experience in the Southeast Texas area (R. 80-1).

2. The 1937 Case.

The Commissioner of Internal Revenue assessed a deficiency against Taxpayer on the theory that the loan set forth above was in fact a "sale". The Government contended that Taxpayer must include in its 1937 income the $300,000.00 borrowed from Humble as a gain on the sale of an asset.

The Tax Court upheld the Commissioner's deficiency determination, holding that the $300,000.00 received must be considered the proceeds of a sale, not a loan. This decision was affirmed by the United States Court of Appeals for the Fifth Circuit. *Bankers Mortgage Company* v. *Commissioner*, 1 T. C. 698 (1943), aff'd, 141 F.2d 357 (5th Cir. 1944), aff'd on rehearing, 142 F.2d 130, cert. denied 323 U.S. 727.

3. Taxpayer's Course of Conduct Following the Judicial Determination of Liability For the Year 1937.

In accordance with the judicial determination set forth above, Taxpayer paid federal income taxes on what was held to be its gain under the 1937 transaction. The undisputed evidence at the trial of this cause, however, is that thereafter Taxpayer in every other respect continued to treat the 1937 transaction as a loan. Taxpayer's witnesses at the trial were its president, W. W. Moore, and its secretary-treasurer, Gordon Chiles Evans. Mr. Moore participated in the original transactions in 1937, at which time he was a member of Taxpayer's board of directors and its vice president (R. 75-7). Mr. Moore testified that at all times, both before and after the decisions of the courts concerning the year 1937, Taxpayer treated the transactions on its books as a loan, and not as a sale (R. 90, 96). Each month Taxpayer received from Humble a statement showing the allocation of Taxpayer's royalties on the 299½-acre tract between principal and interest on Note No. 1 and principal on Note No. 2 (Taxpayer's Exhibits 8A-8H, R 112-6). Taxpayer then transferred this information to its ledger (Taxpayer's Exhibit 4, R. 99-110). Taxpayer maintained a bills payable ledger as to each note, on which it entered payments as they were made (Taxpayer's Exhibits 5 and 6, R. 110-2).

Taxpayer treated its obligation to Humble on its books as a loan in every respect, including showing such indebtedness on its financial statements (R. 118). As a part of its franchise tax return for the State of Texas each year, it paid a franchise tax on the indebtedness evidenced by the notes (R. 116-8). It further paid ad valorem taxes on the real property to Fort Bend County and the State of Texas (R. 96).

4. The Present Litigation.

By early 1962 payment of the principal and interest on Note No. 1 and the principal on Note No. 2 was completed by payments from the royalties owned by Taxpayer. Humble did not exercise its purchase option under the contract. Taxpayer paid to Humble $137,389.29, the accrued interest due on Note No. 2 (see transmittal letter, Taxpayer's Exhibit No. 3, R. 91-2). Upon receipt of this interest payment, Humble delivered to Taxpayer a release of the deed of trust lien (Taxpayer's Exhibit 1-E, R. 110; see letter of transmittal, Taxpayer's Exhibit 2, R. 92-3). Taxpayer recorded the release of lien in the Mortgage Records of Fort Bend County, Texas (R. 97).

In its federal income tax return for the year 1962, Taxpayer deducted as interest the $137,389.29 so paid to Humble. The Commissioner of Internal Revenue assessed a deficiency against Taxpayer on the basis that the payment could not be deducted as interest expense.

Taxpayer paid the deficiency assessment, filed claims for refund for 1962 and 1937, both of which were denied, and then brought this action in the United States District Court for the Southern District of Texas, Houston Division against the United States of America (herein referred to as "Government"), to recover the taxes paid due to the dis-

allowance of the interest deduction in 1962 and to secure a redetermination of its tax liability for 1937.

5. The Proceedings in the District Court in this Cause.

Taxpayer in this action in the District Court made claims for refund of taxes illegally assessed both for the year 1962 and the year 1937 as a result of the aforementioned transactions. Concerning the year 1962, Taxpayer sought a recovery on the theory that the payment in that year promptly gives rise to a deduction for interest under Section 163(a) of the Internal Revenue Code of 1954. In addition, Taxpayer invoked the power of the court under Rule 60(b) of the Federal Rules of Civil Procedure to vacate the prior judgment concerning the $300,000.00 received in the year 1937, and to enter judgment in its favor (Taxpayer's First Amended Original Petition, R. 56).

Prior to trial, the Government filed a motion for judgment on the pleadings. In response to such motion, the District Court held that the previous judgment acted as res judicata to Taxpayer's claim for the year 1937, and that Rule 60(b) does not apply (see Memorandum and Order of the District Court, R. 48).

Following the trial as to Taxpayer's claim for refund based upon an interest deduction in the year 1962, the District Court held that the prior judgment acted as collateral estoppel to prevent the allowance of an interest deduction. The formal conclusion of law promulgated by the District Court in this connection is stated in full as follows (R. 131):

> "The doctrine of collateral estoppel applies in the case and the taxpayer and the United States of America are bound by the decisions in *Bankers Mortgage Co.* v. *Commissioner, supra,* relating to the year 1937 for

taxpayer, even though this proceeding involved a different tax year. *Commissioner* v. *Sunnen*, 333 U.S. 591 (1948)."

The rationale of this decision is stated in the remarks of the Court at the conclusion of the trial (R. 126-27):

> "THE COURT: I am not characterizing the transaction. To me, the Fifth Circuit characterized it. If they want to change their characterization of it based upon the facts here, that is up to them to do so.
>
> I may be in error, but this is the first time in my life I have refused to take a definite opinion since I have been on the bench because . . . I think this is a matter for the Fifth Circuit to determine rather than me since the case has already gone up there and they have already characterized it. They had all the instruments up there. They characterererized it as a loan. They at least had some evidence of how these people had treated it on their books when they went up there, and if they want to change it now, I think it is up to them."

6. The Proceedings in the Fifth Circuit Court of Appeals in this Cause.

On appeal, the Court of Appeals affimed. As to the claim for 1962, the Court of Appeals held that the 1943 decision forever settled that the transaction was a sale, and not a loan, and Taxpayer is thereby collaterally estopped from seeking tax treatment of any new occurrence growing out of the transaction in a fashion inconsistent with the 1943 decision. The Court of Appeals expressly granted that the changed facts, and possibly changed legal principles, would be relevant to a de novo consideration of the 1937 transaction itself, but because the 1943 decision settled that the transaction was a sale, such facts and legal principles could not be considered in new matters flowing from the transaction.

As to the claim for 1937, the Court of Appeals held that among the essential elements for an independent action under Rule 60(b) is that a defendant must have been prevented from presenting a meritorious defense in the judgment challenged by "fraud, accident or mistake". Insofar as Taxpayer pleaded the occurrence of a subsequent event rendering the judgment unjust, and did not plead any inability to present a meritorious defense at trial, whether by fraud, accident or mistake, the Court of Appeals held that an independent action under Rule 60(b) was not stated.

REASONS FOR GRANTING THE WRIT

1. The decision below concerning Taxpayer's claim for 1962 should be reviewed because it is in conflict with this Court's opinion in the case of *Commissioner v. Sunnen*, 333 U.S. 591 (1948). *Sunnen* states that the purpose of res judicata is to avoid repetitious suits involving the same cause of action (at 597). However, when a second action between the same parties is upon a different cause or demand, the principal of res judicata is applied much more narrowly (at 597-8), and is more properly called collateral estoppel. In federal income tax cases the doctrine of res judicata is applicable only if the second suit is on a claim for the same tax year; where the cause concerns a different tax year, it constitutes a separate cause of action and only collateral estoppel may operate (at 598-9). It is apparent Taxpayer's claim for the year 1962 cannot be subject to res judicata, but is exposed only to the doctrine or collateral estoppel.

The application of collateral estoppel in this cause must be measured against the following standard in *Sunnen*:

> "And so where two cases involve income taxes in different taxable years, collateral estoppel must be used with its limitations carefully in mind so as to

> avoid injustice. It must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged." (at 599-600)

This statement echoed the conclusion of Dean Griswold in his highly authoritative statement of the proper application or res judicata in federal tax cases, (Griswold, *Res Judicata in Federal Tax Cases,* 46 Yale L.J. 1320 (1937), cited in *Sunnen* at 602) in view of the purposes of the doctrine of collateral estoppel:

> "Where different taxable years are involved in the two cases, res judicata should be applied much more narrowly than has been true in some cases in the past. Not only should it be confined to issues which are identical in the two cases, but the word 'identical' should be rigidly construed to apply only to situations where the applicable statute is unchanged and all of the controlling facts occurred before the earlier of the two tax years." (at 1355)

The "controlling facts" concerning the year 1962 did not "remain unchanged" from the time of the prior judgment. The payment of $137,389.29 interest to secure the release of the lien against the property obviously had not taken place when the 1943 judgment was rendered. In addition, since that time Taxpayer has continued to treat the transaction in every other respect as a loan, and not as a sale, and in some cases to its material disadvantage.

The Court of Appeals relies upon the theory that the 1943 decision forever settled that the transaction between Taxpayer and Humble was a sale, and not a loan, and Taxpayer is thereby collaterally estopped from seeking tax treatment of any new occurrence growing out of the transaction in a fashion inconsistent with the 1943 decision. The 1943 decision that the 1937 transaction was a sale

cannot be relitigated, says the Court of Appeals, and it must govern all matters arising from or connected with that transaction. Neither the District Court nor the Court of Appeals made any determination that subsequent changes in fact are not adequate to justify the avoidance of collateral estoppel; they did not weigh the facts. The Court of Appeals expressly granted that the changed facts would be relevant to a de novo consideration of the 1937 transaction itself.

Under the *Sunnen* decision, the obligation exists to accord the 1962 payment that tax treatment which all facts now available indicate to be correct. The critical premise of the opinion of the Court of Appeals is that the tax treatment accorded the 1962 payment must be logically consistent with the judicial characterization previously given the 1937 transaction. It is this central premise which violates the *Sunnen* decision. It is not the purpose of collateral estoppel to insure that all matters arising from related transactions receive logically consistent treatment where subsequent facts arise affecting the basic questions involved. Neither is its purpose to create vested rights in particular decisions (*Sunnen, supra* at 599).

The very facts in the *Sunnen* case demonstrate that collateral estoppel cannot be employed for the purpose of achieving logical consistency in the treatment of a particular transaction where changes in fact occur. The question was whether a 1935 judgment holding that certain payments to the taxpayer's wife were not taxable to taxpayer collaterally estopped the Commissioner from taxing payments recived after 1935 to the taxpayer.

This Court found that the applicable legal rules had changed since the 1935 judgment and that their application would not tax such payments to the taxpayer (changes in controlling facts and changes in applicable legal prin-

cipals were accorded the same treatment). This Court had no difficulty finding that collateral estoppel did not apply to payments received pursuant to contracts entered into after the 1935 judgment, even though the contracts were virtually identical to the contracts considered in the 1935 decision.

The significant holding was that the 1935 judgment was not collateral estoppel as to the treatment of a payment made after 1935 pursuant to the 1928 contract, the same contract which had previously been held not to produce income to the taxpayer. Thus, the same contract entered into in 1928 was held to have different taxable results after the date of the prior judgment in 1935, from those which it had before that date. The earlier holding did not create any vested right in the taxpayer concerning such payments after the date of the previous judicial determination, nor did this Court seek to achieve a logically consistent treatment of the proceeds of the contracts; it did not hesitate to accord different treatment to payments made under the same contract depending upon whether they preceded or followed the prior judgment. This Court determined to reach a correct decision in the light of the facts and law as they appeared at the later date.

Similarly, the question whether the 1962 payment was deductible as interest should be considered in the light of the facts and law as they appeared in 1962. The 1943 decision did not create any vested right in the Government to treat all matters arising from the transaction between Taxpayer and Humble as incidents of a sale, and to receive automatic judgment without regard to the future matters which arise and to changed circumstances. Taxpayer has yet to obtain a hearing on its claim for the year 1962, since all courts below feel themselves collaterally estopped from considering any issue in this cause.

In addition to the change of facts which has occurred, a change in law has also taken place. The Court of Appeals admits a possible change in the law, but in its quest for logical consistency finds itself collaterally estopped from giving effect to any such change. As will be seen immediately hereafter, the 1943 decision was based on the view that there can be no loan where no party bears personal liability, and the lender ultimately can look only to the property for payment; yet the very effect of applicable, controlling law is that lack of personal liability on any party or entity does not defeat an interest deduction.

2. The decision below concerning Taxpayer's claim for 1962 should be reviewed because it erroneously interprets a provision of the Internal Revenue Code of 1954. The claim to deduction for the 1962 payment as interest is governed by Section 163(a) of the Internal Revenue Code of 1954:

> "(a) General Rule. — There should be allowed as a deduction all interest paid or accrued within the taxable year on indebtedness."

The test as to what constitutes "indebtedness" is set forth in Treasury Regulation § 1.163-1(b):

> "Interest paid by the taxpayer on a mortgage on real estate upon which he is the legal or equitable owner, even though the taxpayer is not directly liable upon the bond or note secured by such mortgage, may be deducted as interest on his indebtedness."

It is an important principle of federal income taxation upon which taxpayers rely pursuant to this regulation that an interest deduction is available to a purchaser of real estate who mortgages the property to secure the indebtedness, but has no personal liability for the indebt-

edness, the mortgage holder instead looking solely to the property for security. In this situation, no person or entity bears liability for the indebtedness, including the person or entity who executes the instrument evidencing the indebtedness. When such a person makes interest payments, a deduction for interest on indebtedness is allowed. 4A Mertens, *Law of Federal Income Taxation* § 26.04; *BNA Tax Management Guide No. 66* at page A-6.

Analysis of the transaction between Taxpayer and Humble reveals it to be completely within the regulation. The only additional factor involved was the option which afforded Humble the right to purchase a portion of Taxpayer's mineral interest when principal on both notes and accrued interest on Note No. 1 had been fully paid, by releasing Taxpayer from its obligation to pay interest on Note No. 2. All other options under the contract amounted to nothing more than a power in Taxpayer to require Humble to look solely to the property for security.

When Humble failed in 1962 to exercise such option to purchase, the situation of Taxpayer became precisely identical to that contemplated by the regulations; failure to pay Humble would result in foreclosure of the lien and the loss of the property. It is this circumstance which under the regulation constitutes "indebtedness" adequate to support an interest deduction, whether or not there is personal liability. *New McDermott, Inc.* v. *Commissioner*, 44 B.T.A. 1035 (1941).

The Court of Appeals avoids the effect of the regulation as follows:

> "The regulation presumes the existence of the essential elements of an interest payment, a bona fide indebtedness and a true mortgage . . ." at 11a, *infra*.

The opinion goes on to quote the 1944 decision as follows:

> "'When the so-called borrower is not required to repay the loan, and where a lender must look to the property which the lender has authorized the borrower to take, and when the borrower may cancel the obligation at his option, the transaction is much more consistent with a sale than with a loan. The word 'loan' implies an advance of money with an absolute promise to repay.'" at 12a, *infra*.

The Court of Appeals is saying that the regulation is relevant only where a "bona fide indebtedness" exists, and holds that no "bona fide indebtedness" can exist where a mortgage holder must look solely to real estate for security, and has no other recourse against any person or entity for payment.

It is clear that the instant case and the situation of any obligation secured solely by real estate, without any personal liability on any person or entity, are identical. The Court of Appeals, by requiring anything more of Taxpayer than that payment of the interest be necessary to release a lien, brings about a change in the treatment of interest deductions generally. This Court should decide this important question of federal law.

3. The decision below concerning Taxpayer's claim for 1937 should be reviewed because the Court of Appeals seeks to graft a new requirement upon actions under Rule 60(b) of the Federal Rules of Civil Procedure.

Rule 60(b) provides in part as follows:

> "This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding . . ."

All relief provided at common law from judgments is made available under Rule 60(b) by motion or by inde-

pendent action. *Oliver* v. *City of Shattuck ex rel. Versluis*, 157 F.2d 150, 152-3 (10th Cir. 1946). The opinion of the Court of Appeals accepts this proposition.

However, the Court of Appeals goes on to state certain "essential elements" of an independent action under the rule. The statement of essential elements is of universal application, and is set forth by the Court of Appeals as follows:

> "The essential elements of the independent action were outlined by the Eighth Circuit in *National Surety Co.* v. *State Bank*:
>
> '(1) A judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of defendant; (5) the absence of any adequate remedy at law.'
>
> In the instant case taxpayer never intimates that mistake, accident or fraud prevented its presentation of a meritorious defense in the original proceeding" at 8a, *infra*.

This Court should review the decision below to insure that the scope of an independent action under Rule 60(b) is not erroneously restricted in this fashion. Relief from a judgment at common law was available in other situations to which the quoted language is not applicable, especially insofar as such language requires mistake, accident or fraud to prevent presentation of a meritorious defense in the original proceeding. See 3 Barron & Holtzoff, *Federal Practice and Procedure* § 1331 and 7 Moore, *Federal Practice* §§ 60.36-40; also note express grounds by motion at Rule 60(b) (5) and (6). In this cause, Taxpayer seeks relief from the judgment on the ground that the judgment

has been rendered unjust by subsequent events. It is obvious that subsequent events cannot be the subject of any mistake, accident or fraud resulting in failure to present a meritorious defense in the original proceeding, for the subsequent events have not even occurred at that time. Relief at common law from a judgment rendered unjust by subsequent events was available by bill or review. Lord Chancellor Bacon's Rules provided as follows:

> "No bill of review shall be admitted except it contain either error in law appearing in the body of the decree without further examinations of matters in fact, or some new matter which hath arisen in time after the decree; and not on any new proof which might have been used when the decree was made. Nevertheless, upon new proof that has come to light after the decree was made, which could not possibly have been used at the time when the decree passed, a bill of review may be granted by the special license of the court; and not otherwise" as quoted in *Purcell* v. *Coleman*, 4 Wall. 519, 521 (1866).

The corresponding remedy in equity was the writ of audita querela. This remedy was described by a Federal District Court as follows:

> "Throughout our jurisprudence there has always been some method of correcting a judgment which becomes unjust by subsequent developments. The original common law method was by a writ of audita querela but the modern remedy is by proceeding in equity." *In re Drainage District No. 7*, 25 F. Supp. 372, 383 (E.D. Ark. 1938), aff'd 104 F.2d 696 (8th Cir. 1939), cert. denied 308 U.S. 604.

Examination of the opinion in *National Surety Co.* v. *State Bank*, 120 F. 593 (8th Cir. 1903) reveals that the Eighth Circuit did not intend its test to extend to the various remedies available at common law and thereby available by an independent action under Rule 60(b). The

opinion was directed only at a specific question and one specific type of equitable review available at common law, that resulting from a prior failure of a party to present a meritorious defense.

In the *National Surety Co.* case, a judgment had been entered against an out of state corporation because the State Auditor had failed to notify the corporation when it received service of process. Upon learning of the judgment, the corporation brought an action to enjoin enforcement of the judgment. The question before the Court was whether the judgment could be reviewed only where the failure to defend resulted from fraud, or whether failure due to accident or mistake would also support review. The thrust of the Court's opinion is that accident and mistake support an action equally as does fraud. The case does not concern or discuss, directly or indirectly, other situations permitting equitable review. Preceding the essential elements quoted by the Court of Appeals in this cause are these words:

> ". . . The essential elements of a good cause of action *for either fraud or accident* . . . The indispensable elements of *such a cause of action* are . . ." *National Surety Co.* at 598-9 (emphasis supplied).

The Eighth Circuit summarized the principle of law which it was announcing as follows:

> "A federal circuit court, sitting in equity, has jurisdiction to enjoin the enforcement of an unconscionable judgment of a state or a national court for new causes, *such as fraud, accident, or mistake*, which prevented the judgment defendant from availing himself of a meritorious defense that was not fairly presented to the court which rendered the judgment." *National Surety Co.* at 600 (emphasis supplied).

This Court must insure that independent actions may continue to be based upon all of the remedies available at com-

mon law, and not restricted to those cases based upon a prior failure to prevent a meritorious defense. As can be seen from the *National Surety* case itself, other remedies were available at common law, the vitality of which should not today be terminated.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Walter P. Zivley
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CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing Petition for a Writ of Certiorari upon

Solicitor General
Department of Justice
Washington, D. C. 20530
— and upon —
Mr. Lee A. Jackson
Chief, Appellate Section of the Tax Division
United States Department of Justice
Washington, D. C. 20530
(RMR: ANL: as 5-74-1345)

being counsel for the Respondent, by depositing the same in the United States Mail, with air mail postage prepaid, on this 8th day of May, 1970.

Walter P. Zivley
Counsel for Petitioner

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27396

BANKERS MORTGAGE COMPANY,
Plaintiff-Appellant,

VERSUS

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

(February 20, 1970)

Before GEWIN, THORNBERRY and AINSWORTH, Circuit Judges.

GEWIN, Circuit Judge: We are again called upon to determine the tax consequences of a 1937 transaction between Bankers Mortgage Company (taxpayer) and Humble Oil and Refining Company (Humble). Over a quarter of a century ago this court[1] quoted Mr. Justice Frankfurter[2] in characterizing the transaction here under scrutiny "as 'a technically elegant arrangement whereby an intricate outward appearance was given to the simple sale' from the taxpayer to the Oil Company." Apparently unburdened by the intervening years and undaunted by our prior decision

[1] Bankers Mortgage Company v. Commissioner, 1 T.C. 698 (1943), *aff'd*, 141 F.2d 357 (5th Cir. 1944), *aff'd on rehearing*, 142 F.2d 130 (1944), *cert. denied* 323 U.S. 727 (1944).

[2] Griffiths v. Commissioner, 308 U.S. 355 (1939).

affirming an exhaustive Tax Court decision, the taxpayer now argues that this court committed error years ago; and if not, new developments and facts now require a judgment in its favor.[3] Taxpayer initiated these proceedings in the United States District Court for the Southern District of Texas to recover excess income taxes paid for 1937 ($165,074.10) and 1962 ($82,587.45). The court found that a prior judicial determination rendered the 1937 claim res judicata and collaterally estopped taxpayer from asserting the 1962 claim. We affirm.

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[3] The position of the taxpayer does not appear to be entirely consistent and logical. In paragraph 5 of its original and amended complaint it is alleged:

> After the aforementioned litigation was concluded, Plaintiff treated the nature of said transaction in the manner so found by the Court, based upon the facts that existed in 1937. However, as of April, 1962, all facts relating to this transaction became definitely ascertainable, since at that time the options available to the parties were considered by the parties and the $200,000.00 note was paid in full by Plaintiff to Humble Oil & Refining Company.

The following facts were stipulated by the parties:

> After the decision in the Bankers Mortgage case referred to above, throughout the years 1937 through 1962, the taxpayer, in accordance with the earlier Tax Court decision, treated the transaction as a sale and did not include in its income the royalty payments credited against its purported indebtedness.

Notwithstanding the foregoing allegation and the foregoing stipulation of facts, the taxpayer argues otherwise in its brief. We quote from the brief:

> Following the final judgment in the previous case in 1944, evidence adduced at trial in this cause reveals that the parties continued to treat the transaction as a loan, and not as a sale. Certainly all hope of achieving any "tax avoidance" was gone; any "shrewd attempt to avoid tax consequences" had failed. Yet the parties continued to treat the transaction as a loan in every respect. Humble sent to Taxpayer statements each month showing the allocation of royalties between principal and interest on the two notes. Taxpayer maintained a bills payable ledger as to each note and credited the payments on such ledgers.

Original brief pp. 27-28.

The district court made the following findings of fact: Prior to 1937, taxpayer leased its mineral rights in a 299.5 acre tract in the Sugarland Oil Field to H. C. Cockburn. The lease awarded to taxpayer certain royalties from the production of any oil or gas. Cockburn's interest under the lease was subsequently assigned to Humble.

In June 1937, taxpayer and Humble entered into an agreement which taxpayer describes as a "loan." Taxpayer received $300,000 from Humble in return for two promissory notes, one for $100,000 and the other for $200,000, payable to Humble. Both notes were due on or before June 9, 1967 and bore 4% annual interest rates. Interest on the $100,000 note was payable monthly and interest on the $200,000 note was due in a lump sum at maturity. The notes were secured by a deed of trust covering taxpayer's mineral interest in the Sugarland tract, including taxpayer's royalty interest under the Cockburn lease.

The terms of the above-described transaction were further defined by an additional agreement. It provides that the royalties (otherwise payable to taxpayer by Humble under the provisions of the Cockburn lease) will be used by Humble to repay the notes in the following order: The royalties will first be applied to the interest and principal on the $100,000 note and then to the principal of the $200,000 note. The district court summarized the additional options contained in the agreement as follows:

> (a) Humble was given the option to purchase the . . . mineral interest of Bankers Mortgage at or within 20 days after the liquidation of maturity of the indebtedness. If such option were exercised, the interest due on Note No. 2 [$200,000 note] would be cancelled, and Humble was required to convey to Bankers Mortgage Company a .0014 royalty interest in oil and gas and a 5/9¢ per long ton royalty on sulphur produced by Humble in the Sugarland Oil Field.

(b) Bankers Mortgage was given the option to require Humble to exercise the option described in (a) *supra*, if Humble did not voluntarily exercise it by giving notice to Humble to that effect within 20 days of Humble's failure to exercise it.

(c) If Humble did not exercise its option to purchase the property and Bankers Mortgage did not exercise its option to require Humble to purchase the property, Bankers Mortgage could pay the remaining balance due under the note and secure a release of the lien.

(d) Bankers Mortgage was given the option at any time to cancel the indebtedness and interest due by conveying the full . . . mineral interest owned by Bankers to Humble.

(e) If the production from the Sugarland Field ceased and the property was abandoned by Humble before the full principal and interest payable on Note 1 [$100,000 note] was fully paid, the notes would be cancelled, and Humble would have the option to require Bankers Mortgage to convey the property to Humble under the same terms as described in (a) *supra*.

Taxpayer's 1937 income tax return described this entire transaction as a "loan." The Commissioner disagreed and assessed an income tax deficit on the theory that a portion of the $300,000 received from Humble was taxable as gain from the sale of taxpayer's mineral interest in the 299.5 acre tract. This controversy was fully litigated in the Tax Court which rendered a judgment for the Commissioner. On appeal, this court affirmed the Tax Court's decision.[4]

In spite of the tax consequences of the transaction, the parties continued to abide by their own understanding of the agreements.[5] By early 1962, the royalty payments due

[4] *See* note 1, *supra*.

[5] *See* note 3, *supra*.

taxpayer under the Cockburn lease had completely paid the principal of both notes and the interest on the $100,000 note. Taxpayer then exercised its option to pay the interest ($137,389.29) on the $200,000 note and receive from Humble a release from the deed of trust lien. Taxpayer's 1962 income tax return indicates that the payment is "interest on a loan" and therefore deductible. When the Commissioner assessed a tax deficiency based on the improper interest deduction, taxpayer paid the assessment and initiated these proceedings claiming a refund for excess taxes paid, not only for 1962, but also for 1937.

The 1937 Claim

Taxpayer contends that the trial court erred in denying its claim for refund of a portion of its 1937 income taxes. It attempts to avoid the fatal impact of the doctrine of res judicata by seeking relief from the prior judgment under Rule 60(b) (6) of the Federal Rules of Civil Procedure.[6] In the alternative, taxpayer suggests that relief may properly be awarded by considering taxpayer's claim an "independent action to relieve a party from a judgment."[7]

The purpose of Rule 60(b) is to define the circumstances under which a party may obtain relief from a final judgment. The provisions of this rule must be carefully interpreted to preserve the delicate balance between the sanctity of final judgments, expressed in the doctrine of res

[6] 60(b) provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative(s) from a final judgment, order or proceeding for the following reasons: ... (6) any other reason justifying relief from the operation of the judgment.

[7] Where the adverse party is not prejudiced an independent action for relief may be treated as a 60(b) motion, and conversely, a 60(b) motion may be treated as the institution of an independent action.

judicata, and the incessant command of the court's conscience that justice be done in light of *all* the facts. In its present form, 60(b) is a response to the plaintive cries of parties who have for centuries floundered, and often succumbed, among the snares and pitfalls of the ancillary common law and equitable remedies. It is designed to remove the uncertainties and historical limitations of the ancient remedies but to preserve all of the various kinds of relief which they offered.

Rule 60(b) contemplates two distinct procedures for obtaining relief from a final judgment. The first is by motion. 60(b) is directly involved in this procedure as it provides (a) the authority to secure relief by motion, (b) the time limitations within which the motion must be filed, and (c) the grounds on which relief can be predicated. This procedure is intended to completely replace the ancillary common law and equitable remedies of coram nobis, coram vobis, audita querela, bill of review and bill in the nature of a bill of review,[8] which are specifically abolished by this rule. The motion for relief from final judgment must be filed in the district court and in the action in which the original judgment was entered.[9] No independent jurisdictional ground is necessary because the motion is considered ancillary to or a continuation of the original suit.[10] Obvi-

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[8] Advisory Committee Note of 1946 to Subdivision (b) of Rule 60, reprinted in 6A J. Moore, Federal Practice & Procedure § 60.01[8] (2d ed.) (hereinafter, Moore's Federal Practice); 3 W. Barron & A. Holtzoff, Federal Practice and Procedure § 1321 (Rules ed. 1960); 7 Moore's Federal Practice § 60.27[1], at 294, & § 60.18[8].

[9] Advisory Committee Note of 1946 to Subdivision (b) of Rule 60, reprinted in 6A Moore's Federal Practice § 60.01[8]. One possible exception to this rule occurs when the judgment of one district court is registered in another district or other districts. *See* 7 Moore's Federal Practice § 60.28[1].

[10] 7 Moore's Federal Practice § 60.28[1] & [3].

ously a 60(b) motion addressed to a United States District Court is not the proper vehicle for securing relief from a decision of the Tax Court.

The second procedure contemplated by Rule 60(b) is an independent action to obtain relief from a judgment, order, or proceeding. The first saving clause specifically provides that 60(b) does not limit the power of the court to entertain such an action.[11] It is important to emphasize that "independent action", as used in this clause, was meant to refer to a procedure which has been historically known simply as an independent action in equity to obtain relief from a judgment.[12] This action should under no circumstances be confused with *ancillary* common law and equitable remedies or their modern substitute, the 60(b) motion.[13]

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[11] The saving clauses of 60(b) provide:

> This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. Section 1655, or to set aside a judgment for a fraud upon the court.

In the instant case, we are concerned only with the first saving clause which relates to the independent action.

[12] For an excellent analysis of the scope and purpose of the *saving clauses* of 60(b), see 7 Moore's Federal Practice §§ 60.31-60.35. The scope of the saving provisions of 60(b) as it now applies should not be confused with the saving provisions of *original* 60(b) which was amended on December 27, 1946 becoming effective on March 19, 1948. A good discussion of the scope of the saving provisions of *original* 60(b) can be found in 7 Moore's Federal Practice §§ 60.11, 60.12, *et seq.* The independent action in equity preserved by the first saving clause of 60(b) is discussed in detail in 7 Moore's Federal Practice §§ 60.36-60.40.

[13] Advisory Committee Note of 1946 to Subdivision (b) of Rule 60 reprinted 6A Moore's Federal Practice § 60.01[8], provides:

> If the right to make a *motion* is lost by the expiration of the time limits fixed in these rules, the only procedural remedy is by a new or independent action to set aside a judgment *upon those principles which have heretofore been applied in such an action.* [Emphasis added]

> When a court grants relief from a judgment or decree by a new trial or rehearing, or by one of the ancillary common law or equitable remedies or their modern substitute, a motion, it is exercising a *supervisory power* of that court over its judgment; but the original bill, or independent action, to impeach for fraud, accident, mistake or other equitable ground is founded upon an *independent and substantive equitable jurisdiction.* [Emphasis added][14]

The essential elements of the independent action were outlined by the Eighth Circuit in *National Surety Co.* v. *State Bank:*

> (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of defendant; (5) the absence of any adequate remedy at law.[15]

In the instant case taxpayer never intimates that mistake, accident or fraud prevented its presentation of a meritorious defense in the original proceeding. Similarly, we are totally unable to understand why "equitably considerations" require that the effect of the judgment be compromised.

In essence, the taxpayer is arguing that because it has strictly abided by the terms of the 1937 agreement, it should have an opportunity to relitigate the issue resolved by the

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[14] Moore's Federal Practice § 60.36.

[15] 120 F. 593, 599 (8th Cir. 1903). *See*, Chicago, R. I. & P. R. Co. v. Callicotte, 267 F. 799 (9th Cir. 1920), *cert. denied* 255 U.S. 570 (1921).

1943 Tax Court decision. The independent action cannot be made a vehicle for the relitigation of issues. Courts have consistently held that a party is precluded by res judicata from relitigation in the independent equitable action issues that were open to litigation in the former action where he had a fair opportunity to make his claim or defense in that action.[16] The district court acted correctly in denying relief from the prior judgment and dismissing taxpayer's 1937 claim.

The 1962 Claim

Taxpayer contends that the 1962 payment to Humble was made pursuant to the terms of the 1937 "loan" agreement and is therefore properly deductible under § 163(a) I.R.C., which provides:

> (a) General Rule. — There shall be allowed as a deduction all interest paid or accrued within the taxable year on indebtedness.

The district court held that the 1943 decision of the Tax Court, as affirmed by this court, collaterally estops taxpayer from relitigating the question raised by this claim. Taxpayer argues that the doctrine of collateral estoppel, as restricted in *Commissioner* v. *Sunnen*,[17] was erroneously applied to the 1962 claim. In that case the Court stated:

> [W]here two cases involve income taxes in different years, collateral estoppel must be used with limitations carefully in mind so as to avoid injustice. It must be

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[16] American Surety Co. v. Baldwin, 287 U.S. 156, 166 & 167 (1932); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923); American Bakeries Co. v. Vining, 80 F.2d 932 (5th Cir. 1936) (action to obtain relief from state judgment on ground of fraud properly dismissed where state Supreme Court, while asserting that it had power to order a new trial because of the fraud, refused to do so). *See* 7 Moore's Federal Practice § 60.37[1], at 623.

[17] 333 U.S. 591 (1948).

> confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged.[18]

The doctrine should not be applied in the instant case, according to taxpayer, because (a) the matter raised is not identical with that decided in the first proceeding, and (b) there has been a substantial intervening change in the controlling facts and applicable legal principles.

We are convinced that the 1943 decision and the claim presently before us involve precisely the same issue: Was the 1937 transaction a bona fide loan? The only real distinction is that the earlier decisions involved "proceeds" of the alleged loan while the instant claim concerns "interest" on the alleged loan. In both situations, the taxpayer's contention is grounded on the proposition that the 1937 transaction was a genuine loan.

Taxpayer also argues that a change in controlling legal principles prevents the application of collateral estoppel. This contention is based solely on Treasury Regulation 1.163-1(b), which provides:

> Interest paid by the taxpayer on a mortgage on real estate upon which he is the legal or equitable owner, even though the taxpayer is not directly liable upon the bond or note secured by such mortgage, may be deducted as interest on his indebtedness.

Taxpayer explains that the general principle, devolving from this regulation, does not require a taxpayer to be directly liable on a bond or note secured by a mortgage in order for interest paid on the mortgage to be deducted as interest on indebtedness under § 163. Assuming that tax-

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[18] 333 U.S. 591, 599-600 (1948).

payer's interpretation is correct, he has nevertheless failed to prove that a change has occurred in a controlling legal principle. The regulation presumes the existence of the essential elements of the interest payment, a bona fide indebtedness and a true mortgage, and it may very well announce a changed legal principle when those prerequisites are present. However, the issue presented by the instant claim is *whether* the essentials of a genuine interest payment exist. The regulation does not announce a new legal principle which would be relevant in resolving that inquiry.

Taxpayer's final contention, that a "change in controlling facts" has occurred, is also without merit. The facts which have changed, according to taxpayer, are: (1) Taxpayer has continued to treat the 1937 transaction as a loan, often to its own material detriment; and (2) taxpayer made an "interest" payment of $137,389.29 in 1962 as required by the "loan" agreement. While both of these facts would be relevant in a de novo consideration of the nature of the 1937 transaction, they are by no means controlling. The apparent pertinence of point (2) results from the taxpayer's use of conclusory terms. Correctly stated, taxpayer made a payment of $137,389.29 in 1962 in accordance with the 1937 agreement. The fact of payment is not controlling in determining the character of the payment — whether it is interest on a genuine loan. In addition, the first point does not appear to present a *changed* fact. Taxpayer instead is saying that its attitude toward and treatment of the 1937 agreement has remained unchanged in spite of the original suit.

Taxpayer insists that the 1962 payment has additional significance in that the earlier decision of this court was based on the erroneous assumption that the 1937 agreement was complete and that the future "interest" payment could *not* occur. We find no basis for this assertion. In its 1943

decision, this court carefully outlined ten reasons for its conclusion that the 1937 transaction was not a loan. Not one of these includes such an assumption. This court summarized the reasons underlying its decision in the following manner:

> When the so-called borrower is not required to repay the loan, and where a lender must look to the property which the lender has authorized the borrower to take, and when the borrower may cancel the obligation at his option, the transaction is much more consistent with a sale than with a loan. The word "loan" implies an advance of money with an absolute promise to repay.[19]

This statement should be considered to forever resolve the issue. The 1937 transaction was not a loan agreement and taxpayer may not relitigate that question.

AFFIRMED.

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[19] Bankers Mortgage Company v. Commissioner, 142 F.2d 130, 131 (1944).

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1969

No. 27396

D. C. Docket No. CA 67-H-977

BANKERS MORTGAGE COMPANY,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before GEWIN, THORNBERRY and AINSWORTH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

February 20, 1970

Issued as Mandate: